Office-Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LARRY P. CRAMER,

Petitioner,

vs.

TYRONE C. FAHNER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Printed by Authority of the State of Illinois (P.O. 21120—85—10-19-82)

QUESTIONS PRESENTED FOR REVIEW

Whether the trial court acted within the bounds of its discretion in granting the jury's request to rehear the tapes during deliberations?

Whether the sufficiency of a state court indictment is reviewable by way of federal habeas corpus?

Whether petitioner was denied the right to confrontation even though he was in no way limited in his cross-examination of the State's witnesses?

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CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 2
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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's state court convictions of three counts of conspiracy to commit murder and six counts of solicitation to commit murder were affirmed by the Appellate Court of Illinois, Fourth District. *People v. Cramer*, 64 Ill. App. 3d 688, 381 N.E.2d 827 (4th Dist. 1978). In ruling on petitioner's application for a writ of habeas corpus, the United States District Court for the Central District of Illinois granted the writ as to the conspiracy

convictions, but denied the writ as to the solicitation convictions. *Cramer v. Fahner*, Docket No. 79-2238 (C.D. Ill. 1980). Petitioner appealed, and respondent cross-appealed, to the United States Court of Appeals for the Seventh Circuit, which affirmed both actions of the district court in an opinion not yet published. *Cramer v. Fahner*, Docket Nos. 80-2545, 80-2757 (7th Cir. 1982). Copies of all three opinions are attached to the petitioner's brief as appendices.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254. However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENTS OF FACTS

The facts relevant to the issues raised by petitioner are adequately set forth in the opinions of the courts below, and need not be restated at length here. Respondent directs this Court's attention to the argument portion of this brief, where the facts pertaining to each claim of error are discussed.

There is, however, one glaring omission in petitioner's statement of facts concerning the procedural history of this case. Following his appeal to the Appellate Court of Illinois, and before his application for a writ of habeas corpus, petitioner filed a petition for writ of certiorari in this Court which was denied. *Cramer v. Illinois*, 444 U.S. 827 (1979). The first and third issues raised in the present petition are identical to the first and fourth issues raised in the former, and the second issue raised herein involves the same considerations as the second, third and fifth issues raised previously. Thus, the grounds raised herein for issuance of the writ have been recently considered by this Court.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT ACTED WITHIN THE BOUNDS OF ITS DISCRETION IN GRANTING THE JURY'S REQUEST TO REHEAR THE TAPES DURING DELIBERATIONS.

Three hours after the jury retired to deliberate, they sent a request to the trial court for an Illinois road map and a transcript of some tapes that were played during the trial. The tapes were of phone conversations between petitioner and the man he solicited to murder his wife. The request was denied because neither a road map nor a transcript of the tapes was in evidence. Some time later, the jury requested the tapes and a tape player. After consulting with counsel for both sides, the court denied the request because of the risk that the jury might damage the tapes, and because they had had sufficient exposure to the material on the tapes at trial. After twenty hours of deliberations, the court informed counsel that he would call the jury into the courtroom and ask if they were making progress, and if rehearing the tapes would help them. The jury informed the court that they were making progress, but they each said that rehearing the tapes would be helpful. The tapes were then replayed in open court. Forty-five minutes later, the jury returned with a guilty verdict.

Petitioner has never disputed that it was within the trial court's discretion to grant or deny the jury's request to rehear the tapes when that request was initially made. (Slip Opinion at 19) Indeed, it has been uniformly held that the trial court is invested with broad discretion in deciding whether to allow the replaying of tapes which have been admitted into evidence when requested

by the jury. *United States v. Zepeda-Santana*, 569 F.2d 1386 (5th Cir.), *cert. denied*, 437 U.S. 907 (1978); *United States v. Puchi*, 441 F.2d 697 (6th Cir.), *cert. denied*, 404 U.S. 853 (1971); *Hamilton v. United States*, 433 F.2d 526 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *People v. Pierce*, 56 Ill. 2d 361, 308 N.E.2d 577 (1974). The Seventh Circuit saw the question as whether the trial court, by delaying so long in granting the request, had lost its discretion to do so. (Slip Opinion at 21) Resolution of this turned, in the court's mind, on whether the delayed granting of the request created a substantial risk of coercing or confusing the jury. Relying on *United States v. DeStefano*, 476 F.2d 324 (7th Cir. 1973), and *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975), the court found that it did not. (Slip Opinion at 21-25)

Petitioner argues that the trial court, by its actions, singled out a particular piece of evidence as being, in its mind, the most probative, thereby intruding on the jury's function and coercing the guilty verdict that followed. As the court below correctly pointed out, this reading of the situation is not warranted by the record. It was the jury, not the trial court, that focused interest on the tapes, and twice requested to review them.

It is suggested by petitioner that the granting of certiorari in this case would give this Court an opportunity to provide guidance to both state and federal trial judges on the proper handling of judge-jury communications. Respondent submits that the court below fully considered and correctly decided the issue raised, and that the opinion is both scholarly and exhaustive. Moreover, this is a matter entrusted to the discretion of the trial court, requiring the exercise of sound judgment to the unique facts of each case. It is simply not a burning constitutional question warranting expenditure of this Court's finite resources. Accordingly, the petition should be denied.

II.

THE SUFFICIENCY OF A STATE COURT INDICTMENT IS NOT REVIEWABLE BY WAY OF FEDERAL HABEAS CORPUS.

Petitioner makes the claim that his conviction rests, at least in part, on proof of facts which were never presented to the grand jury and thus could not have formed the basis of his indictment. It does not appear that he questions whether that evidence should have been admitted at trial. Therefore, it must be presumed that it is the validity of the indictment which is challenged. This presumption is borne out by petitioner's assertion, at pages 17 and 18 of his brief, that the validity of a state court indictment may be challenged in federal habeas corpus proceedings where it is shown that the indictment is so defective as to deprive the court of jurisdiction; plainly does not charge a crime; or is so vague that it does not inform the defendant of what actions form the basis of the charge. At page 21 of his brief, petitioner settles on the last as the ground for his attack.

It is generally accepted that the validity of a state court indictment is not reviewable by way of federal habeas corpus. *Knewel v. Eagan*, 268 U.S. 442 (1925); *Branch v. Estelle*, 631 F.2d 1229 (5th Cir. 1980); *Henderson v. Cardwell*, 426 F.2d 152 (6th Cir. 1970); *United States ex rel. Mintzer v. Dros*, 403 F.2d 42 (2nd Cir. 1968); *United States ex rel. Budd v. Maroney*, 398 F.2d 807 (3rd Cir. 1968); *Johnson v. Beto*, 383 F.2d 197 (5th Cir. 1968). Petitioner's claim of vagueness seems to stem from his concern that it is impossible to tell whether the petit jury's verdict is based on the same evidence relied on by the grand jury to indict. (Pet. Br. at 20-22) However, this argument does not fall within the exception embraced by petitioner. He does not allege, for instance, that he was not sufficiently informed of the acts which

the State would rely on to prove the crime, or that a motion for a bill of particulars would not have remedied any lack of notice. Nor does he argue that he could not have been convicted under any set of facts provable under the indictment. Finally, he does not argue that the evidence which was presented to both the grand and petit juries could not have formed the basis for his conviction. In short, he offers no reason why the application of the general rule by the court of appeals was inappropriate here.

Both courts below correctly concluded that petitioner has failed to allege sufficient grounds for review of a state court indictment by way of federal habeas corpus proceedings. Therefore, the petition should be denied.

III.

SINCE THE TRIAL COURT IN NO WAY LIMITED PETITIONER'S CROSS-EXAMINATION OF PATTY COZAD, THERE WAS NO DENIAL OF THE RIGHT TO CONFRONTATION.

Petitioner alleges that the State concealed certain information concerning witness Patty Cozad which could have been used by the defense to impeach her, including the fact that she had been arrested on drug charges and that she had used her married name of Stafford when arrested. Despite the obvious similarity of these allegations to the facts of *Brady v. Maryland*, 373 U.S. 83 (1963), petitioner contends that it was his right to confrontation that was violated, citing *Davis v. Alaska*, 415 U.S. 308 (1974), *Smith v. Illinois*, 390 U.S. 129 (1968), and *Alford v. United States*, 282 U.S. 67 (1931). He does not allege that Ms. Cozad gave false testimony which would have been contradicted by the facts not disclosed, or that he was prevented by the trial court from exploring any areas on cross-examination. For this reason, re-

spondent argued below, and reasserts here, that *Davis*, *Smith*, and *Alford* are inapposite.

The court of appeals treated this claim as one implicating the *Brady* rule, even though petitioner argued in his brief (at page 33) that the facts did not give rise to a *Brady* violation, and went on to find the error harmless under *United States v. Agurs*, 427 U.S. 97 (1976). (Slip Opinion at pp. 9-11) Petitioner, in his petition for rehearing at page 1, referred to the court of appeals' *Brady-Agurs* analysis as "entirely reasonable," but persisted in his contention that his right to confrontation had been violated. Thus, it appears that petitioner's position is that his right to confrontation was violated by the State's failure to disclose information which he has consistently maintained was not required by *Brady* to be disclosed. This position is, to say the least, anomalous.

In his answer to the petition for rehearing, respondent argued that the court of appeals' analysis of this issue under *Brady* and *Agurs* was appropriate because no case was cited where a similar fact pattern was treated as creating a confrontation problem. Petitioner now replies to that argument by citing *United States ex rel. Annunziato v. Manson*, 425 F.Supp. 1272 (D. Conn.), *aff'd*, 566 F.2d 410 (2nd Cir. 1977), which he calls "[T]he only reported case petitioner could find involving this issue . . . where the district court held that a state habeas prisoner was denied the right to confrontation by the failure of the State to disclose exculpatory evidence concerning the bias of a key witness for the prosecution. . . ." (Pet. Br. at 25) Even a cursory reading of *Annunziato* reveals that the district court held nothing of the kind. In that case, the trial court refused to allow the defense to cross-examine prosecution witnesses concerning drug charges pending against them to show

their bias or motive to testify falsely, even though such evidence was admissible as a matter of state law. 425 F. Supp. at 1275. The court held that ". . . the right to cross-examine a witness to impeach his credibility or show motive or prejudice is fundamental to a fair trial . . . ," (*Id.* at 1275), and that "[T]he limits placed on the cross-examination of Bruce Pino were unjustified . . . and not harmless beyond a reasonable doubt." *Id.* at 1276. The court went on to find that "[T]he harmful effect of the denial of the right to cross-examination protected by the sixth amendment . . . was further exacerbated by the prosecution's failure to disclose that the witness, Pino, had actually been promised leniency and other extensive police aid in return for his testimony." *Id.* at 1277. The record disclosed that Pino actually lied about whether he had made a deal with the authorities. *Id.* at 1278. Thus, the district court's holding in *Annunziato* that the confrontation clause had been violated was based solely on the trial court's improper limitation of the scope of cross-examination. This alone is enough to distinguish *Annunziato* from the case at bar. Moreover, the fact that the State withheld exculpatory evidence from the defense was treated in *Annunziato*, appropriately, as a *Brady* violation. Therefore, *Annunziato* not only does not support petitioner's position, it actually supports respondent's.

The court below, employing the proper analysis, correctly concluded that petitioner is not entitled to relief. Petitioner's contention that a different analysis is required by the facts is groundless. Accordingly, the petition should be denied.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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October 19, 1982